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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Rate Adjustment Due To Extraordinary or Exceptional Circumstances, 2010	:	Docket No. R2010-4R

INITIAL COMMENTS OF TIME WARNER INC.
IN RESPONSE TO COMMISSION ORDER NO. 757
(July 25, 2011)

Pursuant to Order No. 757, Notice and Order Establishing Procedures on Remand (issued July 11, 2011), Time Warner Inc. hereby submits its initial comments in the above-captioned docket.

Interest of Time Warner

Through its wholly owned subsidiary Time Inc., Time Warner Inc. (Time Warner) is the largest magazine publisher and the largest user of Periodicals Class mail in the United States.[1] Time Warner was an active participant in the proceedings before the Commission in Docket No. R2010-4[2] and an intervenor in support of the Commission in the proceedings before the Court of Appeals for the

[1] *See* Written Testimony of James O'Brien, Vice President, Distribution and Postal Affairs, Time Inc., before the Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia (May 12, 2010).

[2] *See* Initial Comments of Time Warner Inc. on United States Postal Service Exigent Request (filed August 17, 2010); Reply Comments of Time Warner Inc. on United States Postal Service Exigent Request (filed September 2, 2010).

District of Columbia Circuit that are on remand to the Commission in this docket.[3]

Position of Time Warner

If the Commission on remand takes as its point of departure the point at which the various arguments came to rest when the Court issued its decision in *USPS v. PRC*, it will find it impossible to achieve a coherent result. The Commission should not allow itself to become distracted or sidetracked on remand by previous arguments or analytical or interpretive missteps, whether its own, the Court's, or those of other parties. It can and should, fully consistent with the PAEA and respect for the Court's institutional authority, take an entirely fresh look at the question which the Court has remanded to it: i.e., "how close the relationship must be, that is, how much of the proposed adjustment must be due to the exigent circumstance." *PRC v. USPS*, slip op. at 9.

In performing this task, the Commission needs to be especially mindful of the proper distinction between its role and that of the Court in the highly specialized context of judicial review of statutory interpretation under the *Chevron* doctrine. *Chevron* step 1 concerns a statute's plain meaning. When a court with proper jurisdiction declares a statute's plain meaning, the matter is over as far as the agency is concerned (unless there is an appeal to a higher court). The court's interpretation is authoritative. *Chevron* step 2 concerns the part of a statute's meaning that is not plainly stated—i.e., the part that is left unstated or is stated

[3] *See* PRC v. USPS, Case: 10-1343 (D.C. Cir. 2011), Brief of Intervening Respondents Affordable Mail Alliance *et al.* (January 14, 2010) (hereinafter cited as PRC v. USPS).

ambiguously. This part of a statute's meaning, which is generally established through a mixture of interpretation, policy choice, and judgment, is always for the agency to determine in the first instance:

> *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." . . . [A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.

National Cable & Telecommunications Ass'n. v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (hereinafter *National Cable*).

If the Commission keeps this distinction at the forefront of its analysis, it should have little trouble in:

(a) recognizing that the "question" remanded to it by the Court actually conflates two separate and distinct questions--namely:

  (1) how close must the causal relationship between the proposed rate adjustment(s) and the exigent circumstance(s) be? and

  (2) how much—i.e., what proportion, or percentage, or amount—of the proposed rate adjustment(s) must be due to the exigent circumstance(s)? and

(b) deciding what the answers to those two questions must be—namely, something very like the following:

  (1) the causal relationship must be primary or predominant, although not necessarily exclusive; and

  (2) all of the rate adjustments, with only *de minimis* exceptions, must be due to the exigent circumstances.

Summary of Argument

The body of these comments will develop an argument that the Commission should keep *Chevron* at the forefront of its attention in performing its responsibilities on remand and, in particular, that it should focus on the distinction between its proper function and that of the appellate court under *Chevron*.

First, as a preliminary matter, we show that, however useful *Chevron* may be as a framework for judicial review of an agency's interpretations of statute, it is not very useful to an agency as a tool for statutory interpretation in the first instance.

Second, we review the precedents that govern cases in which an appellate court finds that an agency has incorrectly decided, under *Chevron* step 1 (which concerns meanings plainly expressed by a statutory text), an issue that belongs under *Chevron* step 2 (which concerns meanings ambiguously expressed or unexpressed by a statutory text).

The governing precedents of both the Supreme Court and the D.C. Circuit hold that, once an appellate court has determined that an issue lies within the scope of *Chevron* step 2 rather than *Chevron* step 1, the court should remand the question to the agency and refrain from further addressing the merits of the issue, since "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." *National Cable*, 545 U.S. at 980. "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank (South Dakota), N. A.,* 517 U.S. 735, 742 (1996).

Third, we apply those precedents, which require that an appellate court's formulation of a *Chevron* step 2 question not have the effect of pre-empting an

agency's opportunity to faithfully exercise its own discretion to resolve any statutory ambiguity and its own expertise in the formulation of any policy that might be necessary to fill such gaps as may be left by Congress. While there is no indication that the Court intentionally loaded or otherwise distorted the question presented to the Commission on remand, it is plain on the face of the Court's opinion that it confounded two separate and distinct issues that cannot logically be combined into a single question: (1) how close must be the causal relationship between the proposed rate adjustment(s) and the exigent circumstance(s); and (2) what proportion of the proposed rate adjustment(s) must be due to the exigent circumstance(s).

Addressed separately, neither question is especially difficult. If one tries to combine them into a single question, both that question and any possible answer are completely incoherent.

Fourth, we show that where "Congress has delegated to an agency the authority to interpret a statute," the Supreme Court has unequivocally given its approval to "allowing an agency to override what a court believes to be the best interpretation of a statute . . . since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *National Cable*, 455 U.S. at 981.

Fifth, in performing its task on remand, the Commission should be mindful that its factual findings, expert judgments regarding testimony, careful recitation of relevant legislative history, and policy evaluations were left undisturbed by the Court's opinion.

Sixth, holding and *dictum* are especially densely intertwined in the last three pages of the Court's opinion. Yet by keeping the roles of the Commission and the

Court under *Chevron* clearly in mind, it is possible to disentangle them with some assurance. As we have already observed, once a court has identified a question as belonging to the realm of *Chevron* step 2, it ought to have no more to say about any mistaken answer under step 1 that an agency may have provided to the question. The Court in the instant proceeding had a great deal more to say about the incorrect step 1 interpretation that it ascribed to the Commission, both about *why* it believed the interpretation was incorrect and the possible range of interpretations under step 2 that it believed would be acceptable. All of that discussion (a) is *dictum*, (b) should not be allowed to obscure the doctrine, as enunciated by the Supreme Court, that "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . [and that] the agency remains the authoritative interpreter (within the limits of reason) of such statutes," *National Cable*, 545 U.S. at 980, and (c) constitutes an informative case study that helps to illustrate the wisdom of *Chevron*'s observations that:

> "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy . . . " [and] the formulation of that policy might require "more than ordinary knowledge respecting the matters subjected to agency regulations."

*Mayo Foundation for Medical Education and Research v. United State*s, 2011 U.S. LEXIS 609 (S.Ct., January 11, 2011) (quoting *Chevron U.S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 844 (1984).

It is clear that the Court found that in some respects the Commission's Order meant something different from what the Commission believed it meant. To the extent, if any, that such a finding by the Court is essential to its holding, it is dispositive, and the issue is no longer open to argument. However, the fact that the Court may have linked such a finding to its holding—for example, that the

Commission interpreted "'due to' as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances," slip op. at 11—does not in itself demonstrate that the finding is essential to the Court's holding.

A careful review of the Court's opinion will show that there are two categories of statement that may on first impression appear to be holding but that turn out to be *dictum*. One consists of factual statements of the sort mentioned just above. The Court remanded the proceeding to the Commission based in part on its finding, not announced until the penultimate sentence of the opinion, that at *Chevron* step 1 the Commission "interpret[ed] 'due to' as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances," slip op. at 11.[4]

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[4] A number of statements by the Court are *similar* to the statement in its penultimate sentence. For example, it states (slip op. at 3) that the Commission "incorrectly concluded the plain meaning of that phrase ['due to'] requires the proposed rate adjustments to be 'tailored to offset the specific effects of the claimed exigency.'" Whatever the Commission may have meant by that expression, as it stated in its Brief to the Court (at 39-40), it did *not* mean that it required a precise offset ("[B]ecause the Postal Service made no attempt at all 'to isolate and explain how [the recession and resulting volume declines] caused its cash flow problem' or to 'show that its proposed rate adjustments are tailored to offset the specific effects of the claimed exigency,' the Commission had no occasion to opine on the level of precision required" [bracketed words added by the Commission]).

The Court later states (slip op. at 9):

> we next consider how close the relationship must be, that is, how much of the proposed adjustment must be due to the exigent circumstance. The Postal Service asserts the Commission incorrectly imposed a "strict 'nexus' or offset test," requiring that the proposed adjustments mirror the amount of revenue the Postal Service can demonstrate was lost solely "due to" the recession and its effect on mail volume, dollar-for-dollar. Pet'r's Br. 3-5. Indeed, the Commission seems to have required a very close match, expecting the Postal Service to "show that its proposed rate adjustments are tailored to offset the specific effects of the claimed exigency." Exigent Request Denial at 65; *see also id*. at 60-61 ("[I]t is incumbent on the Postal Service to demonstrate how the *specific* rate increases it proposes flow from the *particular* circumstances that it cites as exceptional." (emphases added [by the Court])).

[footnote continues]

We point out that the Court's finding in this respect was not necessary in order for it to have ground to remand the proceeding to the Commission. It was sufficient for the Court to find, as it did, that

> although ["due to"] has a plain meaning regarding causal connection *vel non*, . . . it has no similar plain meaning regarding the closeness of the causal connection. . . . The statute on its face does not make clear which meaning of 'due to' the Congress intended. The Commission therefore could not properly reject the proposed adjustments at *Chevron* step 1.

Slip op. at 9-10.

That is to say, the absence of any finding by the Commission about the closeness of the causal connection (which is what the Commission asserts its Order reflects) is just as sufficient a predicate for remand as is the incorrect *Chevron* step 1 finding that the Court ascribes to the Commission. That incorrect *Chevron* step 1 finding—the alleged requirement of a precise fit—is therefore a *dictum* of the Court's which the Commission is not bound to accept.

The second category of statement which constitutes *dictum* consists of everything that the Court says about what the right or wrong answers to the question it remands to the Commission might be. For example, to any extent that the statement by the Court which we have just examined may imply that, at *Chevron* step 2, the "due to" phrase should *not* be interpreted as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of

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To use a currently popular expression, close perhaps, but again, no cigar. Repetition plus italics may heighten an impression but cannot turn an implication into a declarative statement. The first and only declaration by the Court that the Commission interpreted the exigency provision as requiring a precise fit occurs in the penultimate sentence of the Court's opinion and is unsupported by any citation to the Commission's Order.

revenue lost as a result of the exigent circumstances, the statement is *dictum.* The Court's opinion does not exclude such an interpretation, and it would be entirely improper for it to intend to do so.

Argument

1. *Chevron* is not very useful to an agency as a tool for statutory interpretation.

The point may seem almost too obvious to need stating, but we will state it anyway. The *Chevron* framework was developed for use by appellate courts in reviewing agency interpretations of law. Any attempt to use that framework for the initial task of interpretation will show that it is far from adequate for the purpose. Such an attempt, presumably, would consist of determining, in step one, the plain meaning of the text in question, and in step 2, its residual (unstated or ambiguous) meaning.

Step 1 might be relatively unproblematic. In the case currently under discussion, step 1 for the Commission consisted of: "'Due to' plainly requires a causal relationship between the exigent circumstances' effects on the Postal Service and the amount of the above-cap rate increases." For the Court, step 1 consisted of: "The Commission correctly construed 'due to" as plainly requiring a causal relationship between the exigent circumstances' effects on the Postal Service and the amount of the above-cap rate increases." *See* slip op. at 2-3.

Step 2 presents an entirely different picture. For the Court, step 2 is exhausted when it finds that "the phrase 'due to' has an additional—and ambiguous—meaning, which the Commission did not address." Slip op. at 8, n. 4.

For the Commission, only a portion of what step 2 requires would be filled in by the following passage from its Order, as described by the Court (slip op. at 6):

> Addressing the meaning of the statutory language, the Commission explained that the preposition "due to" "expresses a causal relationship," which mandates that the proposed exigent rate adjustments be causally related to the cited exigent circumstance. *Id*. In addition, the Commission continued, the "reasonable and equitable and necessary" language "provides context for the statutory [due to] command" and "implicitly" reinforces its causal requirement because "[f]or an adjustment to be 'due to' an extraordinary or exceptional circumstance, the Postal Service must show that the adjustment is a 'reasonable and equitable and necessary' way to respond to the circumstance." *Id*. at 55-56.

Of course, nothing contained in that description, nor anything else that ought to go into filling out the meaning of "due to" in response to the Court's remand, is already implicit in the bare instruction, "fill in the ambiguous or silent parts." That is to say, *Chevron* step 2 is in itself useless as an interpretative principle.

2. "*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

We stated two paragraphs above that, for the Court, *Chevron* step 2 is exhausted when it finds that "the phrase 'due to' has an additional—and ambiguous—meaning, which the Commission did not address." This may not seem to ring true as a description of the Court's opinion. It is, however, a true description of how appellate courts are supposed to behave under *Chevron.* Once it has decided that certain issues lie properly within the sphere of *Chevron* step 2 rather than *Chevron* step 1, an appellate court is meant to refrain from asserting its own

views on those matters. The precedents of the D.C. Circuit and the Supreme Court require that it should so refrain.

In *National Cable*, 545 U.S. at 980-985, the Supreme Court addressed this issue at length:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.*, at 843-844, and n. 11. . . .
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> [T]he whole point of point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank (South Dakota), N. A.,* 517 U.S. 735 (1996). . . .
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> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, *supra*, at 740-741. . . . *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.
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> A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative

> constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," *Mead*, 533 U.S., at 247 (Scalia, J., dissenting), by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.
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> . . . Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable).
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> . . . Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction.

The D.C. Circuit has followed that analysis in:

> We must next determine whether the SEC's rule is a reasonable interpretation of the statute. The SEC's rule will satisfy Step Two of the *Chevron* analysis so long as it meets this requirement. It is irrelevant that this court might have reached a different—or better—conclusion than the SEC. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005).

See also *Negusie v. Holder*, 555 U.S. 511, 2009 U.S. LEXIS 1768 (S.Ct. 2008) (reaffirming that where the agency "has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" (quoting *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) *(per curiam),* in turn quoting *INS* v. *Orlando Ventura*, 537 U.S. 12, 16, in turn quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)); and *American Equity*

Investment Life Insurance Co. v. Securities and Exchange Commission, 613 F.3d 166, 173-74 (D.C. Cir. 2009; reissued 2010) ("The SEC's rule will satisfy Step Two of the *Chevron* analysis. . . . . It is irrelevant that this court might have reached a different—or better—conclusion than the SEC" (citing *National Cable)*).

3. It follows that a court's formulation or discussion of a *Chevron* step 2 question must not have the effect of pre-empting the agency's ability to authoritatively interpret a statute that is within its jurisdiction to administer; in the instant case, both the way in which the Court poses the question on remand and the Court's discussion of that question would have such an impermissible effect.

The Court's opinion formulates the issue that it remands to the Commission in ways which would make it impossible for the Commission to perform its proper constitutional function as authoritative interpreter in the first instance of the PAEA. It does so, first, by posing the question of statutory interpretation that the Commission is instructed to answer in the form of a complex question that is not susceptible of any answer which is either coherent or consistent with the meaning of the statute, and, second, by building into its discussion its own suggested resolution of various parts of the *Chevron* step 2 question, which are properly subjects for initial resolution by the Commission rather than the Court.

Simply to list the Court's descriptions of the subject matter of the remand is sufficient to show that it does not identify one subject but rather two distinctly different subjects (emphasis added throughout):

a. "explaining *the extent of causation* the Commission requires the Postal Service to demonstrate between the exigent circumstance's impact on Postal Service finances and the proposed rate increase" (slip op. at 3);

b. "Having concluded that the plain meaning of section 201 requires a causal relationship between the exigent

circumstances and the proposed rate adjustments, we next consider *how close the relationship must be*, that is, *how much of the proposed adjustment must be due to the exigent circumstance*" (slip op. at 9);

c. "the *closeness of the causal connection*" (slip op. at 10);

d. "to proceed to *Chevron* step 2 to fill the statutory gap by determining *how closely the amount of the adjustments must match the amount of the revenue lost* as a result of the exigent circumstances" (slip op. at 10-11);

e. to address at *Chevron* step 2 *how precisely "the Postal Service must match the amount of the proposed adjustments . . . to the amount of the revenue lost* as a result of the exigent circumstances" (slip op. at 11).

These descriptions identify two distinct questions: (1) how close must be the causal relationship between the exigent circumstances and the rate adjustments (a, b, c); (2) how close the amount of the revenues realized from the rate adjustments must be to the amount of the revenues lost due to the exigent circumstances (b, d, e). Item b offers an especially clear example of the confusion, for there the Court puts the two mutually incompatible senses directly in apposition with one another, treating them as if they are, or could be, synonymous.

The Court's opinion contains many examples, large and small, of its failure to distinguish between these two questions. A small example appears at page 8 of the slip opinion:

> First, we agree with the Commission that the plain meaning of "due to" mandates a causal relationship between *the amount of* a requested adjustment and the exigent circumstances' impact on the Postal Service. [Emphasis added.]

Significantly, the statement by the Commission to which the Court refers does not contain the words "the amount of." Apparently, the Commission proceeded on the

natural assumption that when the statute speaks of rate adjustments that are due to exigent circumstances, it intended that *all* of the adjustments referred to be due to such circumstances. It is hard to imagine what a causal relationship between exigent circumstances and some particular amount of revenues greater than those lost due to—or greater than necessary to offset the impact of—those circumstances would be.

The most striking and potentially mischievous instance of the Court's confounding of the two questions is its gratuitous disquisition on the meaning of "due to" once one has arrived at the level of *Chevron* step 2 (slip op. at 9-11). We reproduce the bulk of the relevant paragraph from the Court's opinion immediately below:

> In particular, the "due to" phrase itself is not determinative on this issue because, although it has a plain meaning regarding causal connection *vel non*, as we concluded *supra*, it has no similar plain meaning regarding the closeness of the causal connection. In the latter sense,
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> > [t]he phrase "due to" is ambiguous. "The words do not speak clearly and unambiguously for themselves. The causal nexus of 'due to' has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other."
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> *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999) (quoting *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989)).5 In other words, the phrase can mean "due *in part* to" as well as "due *only* to." A financial crisis can often result from multiple contributing factors, of which only one may be "extraordinary or exceptional." It would not be incorrect to say that the requested rate increase is "due to" the extraordinary factor simply because it is also "due to" other factors as well.6 The statute on its face does not make clear which meaning of "due to" the Congress intended. The Commission therefore could not properly reject the proposed adjustments at *Chevron* step 1. Instead, as the agency charged with implementing section 201(d)(1)(E), the Commission was bound to proceed to

Chevron step 2 to fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances. Because the Commission did not proceed to step 2, we remand for it to do so now. *See Peter Pan Bus Lines, Inc*, 471 F.3d at 1354.

5 *See Adams*, 886 F.2d at 821 (interpreting term "due to pneumoconiosis" in Black Lung Benefits Act to require claimant to "establish only that his totally disabling respiratory impairment . . . was due 'at least in part' to his pneumoconiosis" and rejecting proposed causation standard that would have required proof that pneumoconiosis 'in and of itself' caused totally disabling condition).

6 That said, given the posture of this case, we have no need to decide here whether an increase might be so disproportionate to the exigency's impact on the Postal Service that it could not be considered "due to" that exigency.

The discussion of "due in part to" versus "due only to" in the body of the Court's discussion, derived mostly from the context of tort law, has to do with question (1) (how close a causal relationship must be). The Court discusses the alternative between "due in part to" and "due only to" as if it were a relevant question with respect to the case before it. But at every step, its confusion of unrelated issues simply grows more tangled.

The Court first cites two cases for the proposition that "due to" can sometimes mean "due in part to" and sometimes mean "due only to," and then observes that "[a] financial crisis can often result from multiple contributing factors, of which only one may be "extraordinary or exceptional." But both cases have to do with identifying the causes of medical conditions, one of the few areas where single, exclusive causes still play a significant part in the law. And financial crises, in fact, like almost all candidate exigent circumstances one can think of, will *always*, not just *usually*, result from multiple contributing factors. So that when the Court says that "[i]t would not be

incorrect to say that the requested rate increase is 'due to' the extraordinary factor simply because it is also 'due to' other factors as well," it is saying what, to our knowledge, no one has ever questioned.

The footnote to the sentence we have just quoted (fn. 6), and the sentence that immediately follows the sentence we have just quoted, make clearer still the nature of the Court's confusion of fundamentally different categories. The footnote states: "That said, . . . we have no need to decide here whether an increase might be so disproportionate to the exigency's impact on the Postal Service that it could not be considered "due to" that exigency." This sentence has to do with question (2) (how much of the proposed adjustment must be due to the exigent circumstances?), not with question (1) (how close must the causal relationship be between the exigent circumstances and the rate adjustments?). That is to say, it has no logical connection to the sentence to which it is a footnote. The sentence in the text has to do with whether "the requested rate increase" may be due to "multiple contributing factors," which include the extraordinary factor, or instead must be "due *only* to" "the extraordinary factor." The footnote concerns whether the exigent rate increases must *all* be due to the extraordinary factor, or whether some portion of them can be entirely unrelated to it.

The sentence that immediately follows in the Court's discussion is: "The statute on its face does not make clear which meaning of 'due to' the Congress intended." As we have suggested, it would be surprising if Congress meant "due *only* to," since that would make the exigency provision a dead letter. The nature of ratesetting policy is such that virtually no decision to adjust rates is a system as large and

consequential as the Postal Service will result from anything less than multiple contributing factors; and the internal structure of postal rates is so complex and interdependent that virtually no broad set of rate adjustments can be said to be caused exclusively by one exogenous factor to the utter exclusion of all factors associated with structural rate relationships. But whatever Congress might have meant in this respect has nothing to do with what it might have meant with respect to how much of a proposed rate adjustment must be due to the exigent circumstances.

4. The Commission is entitled to reformulate the Court's question and to ignore its impermissible discussion.

The Commission may—and indeed has an obligation to—reformulate the question remanded to it by the Court, in order to preserve its ability to faithfully interpret the statutory language. Doing so "does not say that the court's holding was legally wrong," but rather only what "*Chevron* teaches [i.e., that] a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *National Cable*, 545 U.S. at 983.

Similarly, expression by the Court of opinions regarding the meaning of the ambiguous statutory language is inappropriate, and the Commission is not merely entitled, but positively counseled by the precedents of the Supreme Court, to give no deference to such opinions. In the instant case, the opinion of the appellate court contains a good deal of non-pertinent discussion about how to resolve that part of the meaning of "due to" which is ambiguous—i.e., about how to answer the very question that has been remanded to the Commission. Moreover, the Court's discussion of this inappropriate subject is everywhere premised on its conflating of two categorically distinct issues as if they were one.

The Commission is entitled on institutional grounds and would be well advised on policy grounds to pay no heed to those parts of the Court's opinion.

> "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" [and] might require "more than ordinary knowledge respecting the matters subjected to agency regulations."

Mayo Foundation For Medical Education And Research v. United States, 2011 U.S. LEXIS 609 (S. Ct., Jan. 11, 2011) (quoting *Chevron* (internal citations omitted)).

Quoting *National Cable,* the Court stated in *Negusie v. Holder*, 555 U.S. 511, 2009 U.S. LEXIS 1768 (S.Ct. 2008):

> This remand rule exists, in part, because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."

The six-member majority in *Negusie* reaffirmed in particular the view that it is not appropriate for an appellate court to prejudge or attempt to prescribe an agency's interpretation of ambiguities in a statute that is within its jurisdiction to administer:

> Justice Stevens would have the Court provide a definite answer to the question presented and then remand for further proceedings. That approach, however, is in tension with the "ordinary 'remand' rule." *Ventura*, *supra*, at 18; see also *Cajun Elec. Power Cooperative, Inc.* v. *FERC*, 288 U.S. App. D.C. 175, 924 F.2d 1132, 1136 (CADC 1991) (opinion for the Court by Silberman, J., joined by R. Ginsburg and Thomas, JJ.) ("[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see"). *Thomas* is illustrative. There, the agency had not determined whether a family may constitute a social group for the purposes of refugee status. The Ninth Circuit held that the family can constitute a protected social group and that the particular family at issue did qualify. 547 U.S., at 184-185.

> The Solicitor General sought review in this Court on "whether the Ninth Circuit erred in holding, in the first instance and without prior resolution of the questions by the relevant administrative agency, that members of a family can and do constitute a particular social group, within the meaning of the Act." He argued that the Ninth Circuit's decision violated the *Ventura* ordinary remand rule. We agreed and summarily reversed. 547 U.S. at 184-185.

Id. (most internal citations omitted.)

5. In performing its task on remand, the Commission should be mindful of the many parts of Order No. 547 that were not disturbed by the Court's opinion.

In performing this task, the Commission should be mindful of the elements of its order that were not disturbed by the Court's opinion. The Court affirmed the Commission's interpretation of the plain meaning of "due to" as requiring a causal relation between the asserted exigent circumstances and the requested increases. It did *not* purport to criticize the following conclusions reached by the Commission:

> "For an adjustment to be 'due to' an extraordinary or exceptional circumstance, the Postal Service must show that the adjustment is a 'reasonable and equitable and necessary' way to respond to the circumstance."
>
> The proposed rates are "not designed to respond to the recent recession, or its impact on mail volume."
>
> [The proposed rates] "represent an attempt to address long-term structural problems not caused by the recent recession,"
>
> The Postal Service failed to "quantify the impact of the recession on postal finances, address how the requested rate increases relate to the recession's impact on postal volumes, or identify how the requested rates resolve the crisis at hand."

Slip op. at 6-7 (quoting Order No. 547 [internal citations omitted])..

In addition to not taking issue with the Commission's findings respecting the factual evidence presented by the Postal Service, the Court took no issue with the

Commission's extensive review of the legislative history of the PAEA and with its conclusions about the purposes of that Act and, specifically, of the exigency provision within the context of that Act and its price-cap regulatory regime.

6. The Commission should take note of how very little in the Court's opinion constitutes holding.

On at least one issue, the Court found that the Commission's Order meant something other than the Order appeared to mean and other than the Commission stated it meant. According to the Court, the Commission incorrectly concluded that the plain meaning of "due to" required "that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances." Slip op. at 11. The Commission's Brief (at 18) stated:

> The Postal Service's objections to the Commission's ruling are based on a misreading of the Commission's order and a misunderstanding of the statutory scheme. The Service incorrectly characterizes the Commission's order as requiring it to calculate with absolute precision the amount of revenue that would be lost due to the recession and to design price increases to recapture precisely that amount of revenue. The Service cites no language from the Commission's order imposing either requirement.

Surprisingly, neither did the Court cite any such language.

The Commission may or may not be disposed to stand by its earlier, entirely persuasive statements that its Order neither stated nor intended the meaning ascribed to it by the Court in this respect. But in either case, two important points about the Court's conclusion should not go unremarked.

First, it is a conclusion about an incorrect interpretation of the statute at *Chevron* step 1—i.e., a mistaken belief that there is a plain meaning in the text where there is no such meaning. Once such an interpretation has been set aside, it

has no further significance for interpretation of the text. The fact that an agency has incorrectly found that a statute *plainly* means something in particular does not exclude the possibility that the statute means exactly that thing, but does so ambiguously rather than plainly, or that exactly that meaning lies within a range of reasonably possible meanings.

Second, the Court's conclusion that "we agree with the Commission that the plain meaning of 'due to' mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances' impact on the Postal Service," along with its conclusions that the phrase "due to" "has no similar plain meaning regarding the closeness of the causal connection" but "has an additional—and ambiguous—meaning, which the Commission did not address," slip op. at 8, 10, 8, n. 4, are sufficient by themselves to warrant the Court's conclusion that "the Commission was bound to proceed to *Chevron* step 2 to fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances," slip op. at 10-11. The failure of the Commission to perform the *Chevron* step 2 analysis of what, in the Court's view, is a central interpretative question with respect to implementation of the exigency provision was in itself sufficient to require remand. The Court's characterization of the Commission's alleged *Chevron* step 1 misinterpretation regarding the extent of causation required under the exigency provision is not essential to its holding.[5]

[5] This is so because, with or without the alleged *Chevron* step 1 misinterpretation, the Court implicitly rejected the Commission's statements that it had rejected the Postal Service's request on [footnote continues]

Of course, even were the Commission to accept the Court's characterization of it supposed *Chevron* step 1 misinterpretation, it would remain the case that neither the characterization of that interpretation as incorrect nor any other statement about it would have any relevance to interpretation of "due to" at the step 2 level. The Court's opinion raises no impediment whatever to a decision by the Commission to interpret the phrase "due to" as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances.

Similarly, the Court's more general statements or implications about the closeness of the relation between the requested rate adjustments and the exigent circumstances, or about how closely the amount of the revenue derived from the adjustments must be to the amount of revenue lost due to the circumstances, relate to matters with respect to which the Court holds that "the 'due to' phrase itself is not determinative . . . because . . . it has no . . . plain meaning," slip op. at 10. All such statements relate to *Chevron* step 2 matters that are for the Commission to decide in the first instance and are therefore *dictum.*

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the grounds that "[T]he Postal Service fails to demonstrate that the proposed rate increase is designed to address the effects of the claimed exigent circumstances," or because of "[t]he failure to relate the proposed rate relief to the identified exigent circumstances," or because of failure to fulfill the requirement that, "as provided by the Commission's rules, the relief requested must relate to the exigency claimed" (Order No. 547 at 58, 60—i.e., failure "to relate the effects of the exigent circumstances and the proposed rate adjustments" (*id*. at 55), which the Court agrees *is* required by the plain meaning of "due to"). By refusing even to acknowledge that ground for the Commission's decision (which happened to be the ground it asserted in Order No. 547), the Court created a situation in which, if one were, hypothetically, to remove the alleged *Chevron* step 1 misinterpretation, one would still be left with a *Chevron* step 2 ambiguity and no sufficient stated grounds in the Commission's Order for its rejection of the Postal Service's Request.

Conclusion

The responsibility for failure to distinguish adequately between the different types of relationships that may define a given legal standard--such as causal connection on the one hand and numerical equivalence on the other—cannot be assigned entirely to the Court that remanded this proceeding to the Commission. Faced with applying a difficult statutory text for the first time, the Commission produced an Order that did not quite master the necessary distinctions.[6] The Commission's conclusion that the Postal Service failed to demonstrate *any* causal relation between its requested rate increases and the asserted exigent circumstances, for instance, does not coexist entirely happily with portions of Order No. 547 that appear to criticize severely the overall or predominant thrust of the Postal Service's affirmative case but not to view the case as essentially a nullity.

Among such parts of Order No. 547 that the Court's opinion recites, for example, are the Commission's findings that "the proposed rates . . . 'represent an attempt to address long-term structural problems not caused by the recent recession' [but by the fact that] "[t]he bulk of [the Postal Service's] costs are fixed by laws, contract or regulations and its operating flexibility is severely limited," that "the 'principal cause of the Postal Service's impending liquidity crisis' is PAEA's mandate that the Postal Service make a $5 billion payment each September . . . to prefund its Retiree Health Benefits Fund," and that "the proposed rates are 'not designed to

[6] By the same token, it must be conceded that none of the commenters in the proceedings (including Time Warner) was able to provide much help to the Commission in working out the meaning of the cloudy statutory language.

respond to the recent recession, or its impact on mail volume.'" Slip op. at 6 & n. 3 (quoting Order No. 437 (some internal quotation marks omitted)).

The Court does not overrule these findings of fact, which are based on the testimony of Postal Service witnesses. It simply recites them. Once it is clear that the question on remand actually must be divided into two distinct questions, the issue of the proper relevance of the findings also comes into clarity. The Commission found that they are relevant to the issue of the existence or closeness of a causal relationship between the requested rate adjustments and the exigent circumstances, and that they tend strongly to show the absence of such a relationship. That finding is clearly reasonable.

At this point, the facts that are central going forward are the facts with which we began this discussion. First, the Commission cannot achieve a coherent result by accepting the Court's deeply flawed opinion as the starting point from which all further progress must proceed. Second, if the Commission keeps at the forefront of its attention the proper distinction between its role and the Court's under *Chevron*, it will find that there is a clear path to a sensible result, fully consistent with respect for the institutional role of the Court, but also fully consistent with its understanding of the exigency provision as expressed in Order No. 547 and with its institutional role as the entity that Congress intended to be "the authoritative interpreter (within the limits of reason" of the PAEA. *National Cable*, 545 U.S. at 983.

If the Commission follows this approach, we think it will be clear that the decision it must respond to on remand consists of the following:

(a) the Court's agreement with the Commission that the plain meaning of "due to" requires a causal relationship between the exigent circumstances and the proposed rate adjustments;

(b) the Court's finding that "the phrase 'due to' has an additional—and ambiguous—meaning, which the Commission did not address" (slip op. at 8, n. 4);

(c) the Court's various descriptions of that "additional—and ambiguous—meaning" as including the closeness of the causal relationship between the exigent circumstances and the proposed rate adjustment, and the relation between the amount of the revenue adjustments and the amount lost due to the exigent circumstances.

We believe that the key to a successful remand proceeding will be whether the Commission recognizes that the "question" remanded to it by the Court (item (c) above) actually conflates two separate and distinct questions--namely:

(1) how close must the causal relationship between the proposed rate adjustment(s) and the exigent circumstance(s) be? and

(2) how much—i.e., what proportion, or percentage, or amount—of the proposed rate adjustment(s) must be due to the exigent circumstance(s)?

As we stated at the outset of these remarks, we think that once those two questions are properly disentangled, the answers will not be especially difficult to infer from the text and purposes of the PAEA. Those answers, already implicit in Order No. 547, are, in essence, we believe, as follows:

(1) the causal relationship must be primary or predominant, although not necessarily exclusive; and

(2) all of the rate adjustments, with only *de minimis* exceptions, must be due to the exigent circumstances.

Finally, as respects item (2) above, the Postal Service never claimed that certain of its requested rate increases--such as the percentage increase for

Periodicals Class that exceeded the average percentage increase requested for all mail--represented the recovery of revenues lost due to the claimed exigent circumstances. Those requests were properly rejected by the Commission and were apparently abandoned by the Postal Service at the appellate stage. See PRC Brief at 35. With respect to the remaining requested increases, the rejection of which by the Commission was appealed to the circuit court, we will mention here just one among a number of sound arguments that these requested increases do not represent revenue losses associated with the asserted exigent circumstances: namely, their permanency. As Order No. 547 pointed out (at 66-67), the Postal Service proposed permanent increases that would continue producing revenues without any relation to the existence of any continuing need for relief.

As respects item (1), we think that the findings by the Commission that we quoted near the beginning of this section, which the Court recited and left undisturbed, are sufficient to support the Commission's conclusion that the Postal Service did not establish the requisite causal relation between the rate adjustments it requested and the exigent circumstances it alleged, whether one considers the question of the existence of such a relationship under *Chevron* step 1 or its closeness under *Chevron* step 2.

Respectfully submitted,

s/
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